3-3-2020

# Asylum Update: Ninth Circuit Deals Two Defeats to the Trump Administration

Peter Margulies
*Roger Williams University School of Law*

LAWFARE

IMMIGRATION

# Asylum Update: Ninth Circuit Deals Two Defeats to the Trump Administration

By **Peter Margulies** Tuesday, March 3, 2020, 8:00 AM

On Feb. 28, the U.S. Court of Appeals for the Ninth Circuit issued decisions that cast substantial doubt on the legality of two Trump administration rules on asylum. In a surprising decision in *Innovation Law Lab v. Wolf*, a panel consisting of Judges William A. Fletcher, Richard A. Paez and Ferdinand F. Fernandez held that the so-called "Remain in Mexico" policy was inconsistent with the Immigration and Nationality Act (INA); Judge Ferdinand dissented. In *East Bay Sanctuary Covenant v. Trump*, the same panel—in a less surprising move—held that the president lacked power under the INA to issue a rule categorically denying asylum to foreign nationals who had entered the country at a point along the southern border that the government had not officially designated as a port of entry. This policy has sometimes been referred to as Asylum Ban 1.0, to distinguish it from the third country rule (sometimes called Asylum Ban 2.0), which bars asylum for foreign nationals who, prior to seeking to enter the United States, traveled through another country that offered refugee protections.

The immediate impact of these rulings on asylum seekers will be limited. The Ninth Circuit stayed its ruling, allowing the "Remain in Mexico" policy—which the administration calls the Migrant Protection Protocols (MPP)—to continue while the government sought review by the U.S. Supreme Court. In *East Bay*, the court's ruling affirms a district court injunction that has been in effect for more than a year, after both the Ninth Circuit—in an opinion by conservative Judge Jay Bybee—and the Supreme Court denied stays. Nevertheless, the careful analysis in both Ninth Circuit decisions represents a vital counterweight to the government's cavalier reading of the immigration statute.

## The "Remain in Mexico" Decision

### *Background*

The court's ruling in *Innovation Law Lab* was unexpected following the May 2019 decision by a different panel of Ninth Circuit judges to stay an injunction against the "Remain in Mexico" policy under which tens of thousands of foreign nationals seeking asylum were required to wait in unsafe conditions in Mexico for months for their immigration court hearings. The MPP is a key component in the administration's strategy for reducing asylum claims, which have been rising for several years due to increased migration from Central American countries such as Guatemala, Honduras and El Salvador.

To stem Central American asylum claims, the administration decided to bypass a detailed statutory process—expedited removal (8 U.S.C. § 1225(b)(1))—that Congress added in 1996 to address an uptick in immigrants at the southern border. The MPP's inconsistency with that detailed statutory scheme was at the heart of the Ninth Circuit's decision that the MPP exceeded executive authority under the INA. Explaining the court's logic requires a careful look at the INA's provisions.

Expedited removal, as the name suggests, is a streamlined process for quickly removing certain foreign nationals who are inadmissible to the United States under the INA—either because they lack a visa or because they have presented fraudulent entry documents. Prior to the advent of expedited removal, these entrants received a full panoply of procedural safeguards, including a hearing before an immigration judge and the possibility of judicial review, resulting in proceedings that often took years to complete. Under expedited removal, that panoply of procedural safeguards was replaced by a minimalist approach.

Immigration officials can now summarily remove foreign nationals at the border unless these people express a fear of persecution in their home country. If an entrant expresses this fear, an asylum officer interviews the subject to determine whether she has a "credible fear" of persecution. If the asylum officer finds credible fear, the subject gets a full hearing before an immigration judge. If the asylum officer finds no credible fear, the subject gets a compressed hearing before an immigration judge—often without counsel, since the government need not provide counsel and finding a lawyer on short notice is difficult. In another departure from procedural safeguards, the expedited removal provisions direct that the asylum claimant over "shall be detained" until completion of proceedings under 8 U.S.C. § 1225(b)(1)(B)(ii).

Further demonstrating Congress's determination to accelerate the removal of asylum seekers who lack a credible fear, the INA also severely limits judicial review of a negative credible fear determination. (This is codified at 8 U.S.C. § 1252(e)(2).) Indeed, the Supreme Court heard arguments on March 2 on whether expedited removal's restriction on judicial review violates the U.S. Constitution's Suspension Clause, which provides for access to the courts through the "Great Writ" of habeas corpus. (See my article here suggesting a middle ground for resolution of the Suspension Clause issue and Aditi Shah's insightful piece here.)

Despite Congress's plan, expedited removal did not work quickly enough for the Trump administration in addressing migration by Central Americans, who have tried to enter the United States in increasing numbers since 2014. Seeking a haven from violence and the effects of deforestation and climate change, families and children have often come to the United States—a change from previous years, when most migrants were adults traveling alone. Under court decisions interpreting the federal court settlement in the *Flores v. Reno* case, immigration officials cannot detain children for longer than 20 days, whether those children entered the United States unaccompanied or with their parents. After the Trump administration halted its much-criticized policy of separating families, officials releasing children after 20 days *also* had to release parents alongside their children, to keep the family together.

Even with the more accelerated procedures of expedited removal, it is virtually impossible to complete an asylum case within 20 days. Claiming asylum, whatever the merits of the claim, became a key to unlock detention-center doors for many Central American border entrants. To reduce the scale of releases in the United States, the Trump administration resorted to the MPP and offloaded asylum seekers and their families to Mexico, which consented to this measure.

To bypass expedited removal, the MPP relies on a hitherto little used INA provision—8 U.S.C. §1225(b)(2)(C)—that allows immigration officials to "return" certain new entrants to a country that is "contiguous" with (i.e., bordering on) the United States while those foreign nationals await a full hearing before an immigration judge. Relying on this statutory language, officials implementing the MPP have returned almost 60,000 asylum seekers to Mexico. Stuck in a marginal existence in Mexico, the asylum seekers dodge criminal gangs and wait for months for their asylum hearings, often without counsel or facilities suited to preparing their legal claims. If asylum seekers lose their hearings, either because they have lacked the chance to prepare adequately or because their claims are not well founded, they either stay in Mexico or return to their home country. Because of this trajectory, the MPP sharply reduced the number of Central American migrants released into the United States, thus achieving a key goal of the Trump administration.

### *The Decision*

In its decision, the Ninth Circuit held that the MPP clashes with the text, structure and history of the expedited removal provision. According to the INA, the contiguous country return provision that purportedly authorizes the MPP "*does not apply*" to persons "to whom … [expedited removal] applies" under 8 U.S.C. § 1225(b)(2)(B). The Oxford Dictionary defines "applies" broadly as the condition of being "applicable or relevant"—a definition that would include all foreign nationals subject to expedited removal under the INA. The

Ninth Circuit noted that *100 percent* of the people returned to Mexico under the MPP check this box. Citing that conflict between the MPP and the INA, the Ninth Circuit held that the MPP exceeds Congress's express limits on the contiguous country return provision.

Defending the MPP, the Department of Homeland Security argued for a narrower reading of the expedited removal provisions in the INA. According to Homeland Security, expedited removal "applies" under 8 U.S.C. § 1225(b)(2)(B) only when the department *chooses* to place an individual in expedited removal, but not when it instead claims power to send that person to Mexico under the contiguous country return provision. But this position results in a strained reading of the statute. "Applies" has a broader dictionary meaning: A statute or body of law "applies" to an individual when it is relevant to that person, as expedited removal surely is to foreign nationals subject to this process. Second, as the Ninth Circuit noted (pp. 31-32), Congress used the words "shall not apply" and "applies" to identify the specific groups subject to the expedited removal process. The text of this provision does not even hint that the government can pick and choose whom to place in expedited removal. Rather, § 1225(b)(2)(B) uses the mandatory term, "shall," suggesting that placement in expedited removal is *required* for foreign nationals who lack a visa or have presented fraudulent papers.

Finally, the course of Congress's deliberations about expedited removal confirms the mandatory nature of the provision. As the Congressional Research Service explained in a 2005 study, a bill that Congress considered in the flurry of activity leading up to legislation in 1996 had stripped out the proposed uniform expedited removal framework, replacing it with authority for a special summary removal process that immigration officials could trigger as needed in "extraordinary migration situations." Absent this trigger, the usual panoply of procedural safeguards would persist, and all entrants would have a full hearing before an immigration judge. However, as the dance of legislation drew to a close, the statute that Congress ultimately enacted omitted any government option, instead subjecting *all* entrants without visas or with fraudulent documents to expedited removal all the time. The government's position in the *Innovation Law Lab* litigation would disregard Congress's change, restoring by executive fiat the option that Congress had deliberately deleted.

The Supreme Court's description of the expedited removal framework in *Jennings v. Rodriguez* also undercuts the administration's view that expedited removal is a government option, rather than a statutory mandate. While *Jennings* did not address the scope of the contiguous country provision, it held that the expedited removal provision *mandated* the detention of asylum seekers. In *Jennings*, detained asylum seekers had asserted that there was room to interpret the statute as *allowing* release of immigrants who were not flight risks. Writing for the court, Justice Samuel Alito rejected this view, citing the "shall be detained" language in the expedited removal provision as establishing that detention was mandatory, not a matter of choice or interpretation.

Justice Alito also observed that the expedited removal provision "applies" to foreign nationals "initially determined to be inadmissible" due to fraud or lack of a visa. When the expedited removal provision "applies," Justice Alito appeared to suggest, all of its features—including mandatory detention—apply as well. That analysis would include features such as the exclusion, under 8 U.S.C. § 1225(b)(2)(B), of all persons subject to expedited removal from the contiguous country return provision.

To reinforce its holding that the contiguous country return provision did not authorize a return to Mexico for asylum seekers subject to expedited removal, the Ninth Circuit also explained that Congress designed the contiguous return provision for a smaller group of migrants who are inadmissible because they had committed crimes such as possession of or trafficking in controlled substances. As the Ninth Circuit observed (p. 34), Congress added the contiguous return provision shortly after the Board of Immigration—an administrative tribunal—held in *Matter of Sanchez-Avila* that an immigration judge could terminate removal proceedings for a Mexican national who had been charged with involvement with controlled substances and whom immigration officials had sent back to Mexico to wait for a U.S. hearing.

According to the Ninth Circuit, Congress added the contiguous return provision to overrule *Sanchez-Avila* and clarify that immigration officials *could* require foreign nationals who had committed crimes to wait in Mexico for their hearings, rather than allow those individuals to be released in the United States. The contiguous return provision applied only to this group of foreign nationals allegedly inadmissible on criminal grounds, not to the far larger group of people who are inadmissible because they lack a visa or have presented fraudulent immigration documents. The Ninth Circuit concluded that the contiguous return provision had a modest niche in the INA but could not perform the exponentially bigger task that the administration requisitioned it to perform under the MPP.

The Ninth Circuit also found that the MPP violated the non-refoulement duty built into the INA, which would require that immigration officials ask asylum seekers whether they feared persecution upon their return to Mexico. On the law, this is a closer legal question, entailing construction of 8 U.S.C. § 1231(b)(3), which bars removal of a foreign national to a country where her "life or freedom" would be at risk because of her race, religion, nationality, membership in a particular social group or political opinion. The government may be correct that the waiting time in Mexico required by the MPP may not be the permanent removal contemplated by the statute. That said, the court seemed to also believe that any reasonable government program would seek to ascertain this risk before it relegated asylum seekers to a protracted wait that might stretch into many months. Moreover, the court was clearly convinced that the enforced sojourn in Mexico was unsafe, given abundant evidence in the record that gangs, mobs and Mexican police had repeatedly threatened and assaulted MPP participants, and that some had fallen victim to robbery, abduction and torture (pp. 42-43).

This cumulative evidence of the MPP's human cost may have helped prod the panel to part company with an earlier decision granting a stay of the district court's injunction against the MPP. While Judge Fernandez dissented, arguing that the earlier panel's decision to grant a stay governed the appeal, the majority rejected that view. Instead, the majority noted that two of the three judges (Judges Paul Watford and Fletcher) on the earlier panel had disagreed at least in part with the government's legal position and that a determination of the merits in the context of a stay request is often preliminary, permitting a fresh look with further briefing by the parties. With the Ninth Circuit's emergency stay in effect as the government prepares a petition for certiorari for the Supreme Court, there should be time for additional consideration of the merits. Until then, however, the human cost of the MPP will continue.

**Affirming the Injunction Against Asylum Ban 1.0**

The Ninth Circuit's ruling in the other case it decided on Feb. 28, *East Bay Sanctuary Covenant v. Trump*, is less surprising—perhaps because the legal issue is more straightforward. The administration sought to deny asylum to persons who arrived at the U.S. southern border at points not designated by the government for admission and inspection of arrivals. However, the Homeland Security rule restricting asylum squarely conflicted with plain statutory text found in 8 U.S.C. § 1158(a)(1). That provision establishes the threshold eligibility for asylum of "any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival*)" (emphasis added). With co-counsel David Marcus, Alan Schoenfeld, and Alex Gazikas of WilmerHale and Penn State's Shoba Sivaprasad Wadhia, I noted in an amicus curiae brief for immigration scholars that this language expressly bars the obstacle that the new Homeland Security rule seeks to place in asylum seekers' path.

The skepticism of conservative Judge Jay Bybee, who wrote the earlier Ninth Circuit decision denying the government's request to stay the district court's injunction, illustrates the legal problems with the administration's position. So does the Supreme Court's refusal to grant the government's stay request. If this case gets to the Supreme Court on the merits, it will be interesting to see if further briefing reveals strengths in the government's position that have thus far remained obscure.

**Conclusion**

Feb. 28 was an important day in the Ninth Circuit for immigration law, suggesting limits to the government's attempts to restrict asylum seekers. The administration can still point to the Department of Homeland Security third country rule, which bars asylum for anyone who prior to seeking to enter the United States has passed through any country—including but not limited to Mexico—that has approved the U.N. Refugee Convention or Protocol or the Convention Against Torture; the Supreme Court stayed an injunction against this rule in September 2019. In addition, the administration has negotiated asylum cooperation agreements (ACAs) with Guatemala, Honduras and El Salvador. The

United States is using the ACAs to offload a growing number of asylum seekers to these unsafe countries, under an INA provision, 8 U.S.C. § 1158(a)(2)(A), which precludes judicial review of such pacts. Against the backdrop of the third country rule and the ACAs, the Ninth Circuit's decisions were a salutary judicial check. Definitive word on the legality of both the asylum ban and the MPP will come if the Supreme Court considers the merits of each policy.

**Topics: Immigration**

**Tags: Asylum**

---

Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of Law's Detour: Justice Displaced in the Bush Administration (New York: NYU Press, 2010).